

April 23 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

FILED

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STATE OF MONTANA

## IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 09-0521

IN RE THE PARENTING OF,  
D.N.S. A MINOR,

ASHLEY N. WATERS,

Petitioner and Appellee,

and

CLAUDE DANIEL SMITH,

Respondent and Appellant.

APPELLEE'S BRIEF

ON APPEAL FROM THE MONTANA SEVENTEENTH JUDICIAL  
DISTRICT COURT, PHILLIPS COUNTY,  
BEFORE THE HON. JOHN C. MCKEON

APPEARANCES:

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1                                   **STATEMENT OF THE ISSUES**

2           Did the district court err in determining the best interests of the child would  
3 be served by the court-ordered parenting plan?

4                                   **STATEMENT OF THE CASE**

5           Appellant Claude Daniel Smith (Daniel), the natural father of D.N.S.,  
6 appeals from the Findings of Fact, Conclusions of Law, and Court-Ordered  
7 Parenting Plan entered by the District Court for the Seventeenth Judicial District in  
8 Phillips County, which granted primary residential care of D.N.S. to the child's  
9 natural mother, Ashley N. Waters (Ashley).

10          The sole issue on appeal is whether the District Court erred when it found  
11 the court-ordered parenting plan was in the child's best interests.

12                                   **SUMMARY OF ARGUMENT**

13          The District Court did not abuse its discretion in determining the child's best  
14 interests. Daniel has anger management and chemical abuse issues. He has also  
15 physically and emotionally abused Ashley in the presence of the child. Further,  
16 Daniel chose to quit his job in Malta, Montana, where D.N.S. was born and resides  
17 with her mother, in order to move 420 miles away to be unemployed and provide  
18 minimal support. He cannot be heard to complain about the distance of travel,  
19 when he voluntarily elected to quit his job and move.

20          Daniel's reliance upon out-dated local bar association guidelines (which are  
21 not court-approved) is unfounded and misplaced.

22          The District Court weighed the testimony, much of which was conflicting,  
23 and issued detailed findings of fact which are supported by substantial, credible  
24 evidence. The judgment should be affirmed.

25                                   **STATEMENT OF FACTS**

26          Ashley resides in and has significant family in Malta, Montana. (Transcript  
27 of proceedings ("Tr.") pp. 59:12; 36:18-25.) Daniel resides in and has significant

28    ///

1 family in Charlo, Montana. (Tr. 137:31 - 138:18.) Both Daniel and Ashley were  
2 22 years old at the time of trial. (Tr. 97:10; Petition to establish parenting plan, p.  
3 1.)

4 Ashley and Daniel met in June, 2007, while each resided in the Bozeman,  
5 Montana, area. (Tr. 60:8-24; 98:2.) In April, 2008, the parties began to reside  
6 together. (Tr. 98:15.)

7 While residing in the Bozeman area, the parties had a volatile relationship.  
8 Daniel drank every night. (Tr. p. 63:9.) Ashley and Daniel argued often as a result  
9 of his drinking. (Tr. p. 63:15.) Daniel often demeaned Ashley verbally. (Tr. p.  
10 75:8-17.) About twice a week, the arguments would turn physical. (Tr. p. 63:25.)  
11 Daniel would push and shove Ashley, and would prevent Ashley from leaving the  
12 residence by force. (Tr. pp. 62:9-18; 216:1-12; 21:2-5.) In May, 2008, Daniel  
13 became so angry that he punched a hole in a door of the parties' apartment:

14 Ashley testified:

15 A: We were supposed to go to a movie, and [he] had two or  
16 three drinks before we even left, within an hour, and so  
17 on the way to the movie I brought it up how I didn't think  
18 it was a positive thing or a good idea to be doing that,  
19 especially when we were going to have a child, I wanted  
20 those patterns to change, and it started an argument. And  
21 we got to the movie and he wouldn't go in, and then he  
22 got out of the car and wouldn't get in, so I drove home.  
23 And then he ran home, and I wanted to get rid of the  
24 alcohol.

25 Q: So what did you do?

26 A: I put it – I put it away. I was afraid if I dumped it out he would really  
27 get physical.

28 Q: So you hid his whiskey?

A: Yeah.

Q: And what happened when you got home?

A: Well, I locked the door because I was afraid of what he  
was going to do, and he started beating on the door, and  
he said if I didn't let him in he was going to break in, and  
after he punched the hole in the door I let him in because  
I didn't want to get kicked out because of the damage to

1 the apartment.

2 Q: And then what happened after you unlocked the door?

3 A: He just kept yelling and screaming at me and cursing at me to give him  
4 his alcohol, so I finally did, and after a while he left me alone.

(Tr. pp. 64:10 - 65:11; 21:6 - 22:15.)

5 On September 12, 2008, Ashley moved from the parties' residence in the  
6 Bozeman area to Malta. (Tr. p. 60:20.) Ashley moved to get away from Daniel.

7 Ashley testified:

8 A: We had been having disputes for our whole relationship,  
9 and I just – it just had gotten to the point where I needed  
10 to leave. I didn't think it was safe for when my daughter  
11 was born to be around that environment. \*\*\* (Tr. p. 61:2-  
12 6.)

13 One week prior to the child's birth, Daniel also moved to Malta. (Tr. p.  
14 67:17.) At the time D.N.S. was born, Ashley and Daniel had attempted to reconcile  
15 and were residing together in Malta. (Tr. pp. 67:23 - 68:7.) Daniel promised he  
16 would "dry out and get treatment, and prove to me his behavioral patters and his  
17 drinking could change." (Tr. 67:2-4.) Initially, Ashley and Daniel lived with  
18 Ashley's parents and things seem to be better. However, the attempt at  
19 reconciliation ultimately failed.

20 While in Malta, Daniel had minimal interaction with the baby, and started  
21 spending time at the local bars. (Tr. pp. 68 - 69; 18:13 - 19:12.) Daniel also  
22 resumed his physical and emotional abuse of Ashley. (Tr. pp. 72, 73:6-11.) On  
23 December 14, 2008, while abusing alcohol, Daniel grabbed Ashley by the arm and  
24 raised a hand as if to hit her. (Tr. pp. 12-13; 72:8 – 73:19; 161:15-22.) He also  
25 took her cell phone to prevent her from calling anyone. (Tr. p. 11:14-17; 161:23-  
26 25.) The child was present at the time. (Tr. p. 13:6.) Ashley testified:

27 Q: And then what happened?

28 A: I started crying again, and I was crying when I ran upstairs, and he  
chased me up the stairs and he grabbed me and turned me around and  
grabbed me by the collar and said that he was going to bitch-slap me.

1 Q: He was going to slap you?

2 A: Bitch-slap me was how he said it. And he had this mean look in his  
3 eye like he was going to do it, and then he said, how do you like that?

4 Q: Did he raise his hand?

5 A: Yeah. And then I just kind of gave up fighting, fell down on the floor,  
6 and he – he left the room, and that was that. He went downstairs and  
7 he threw the phone back at me, and then after he left for a while, I  
8 don't know if that's when he got his whiskey or if he had it in his  
9 truck before, but that's when my mom called.

10 (Tr pp. 72:8 – 73:19.) December 14, 2008, was the date when the parties finally  
11 separated:

12 Well, his promises of change was obviously not going to happen.  
13 [D.N.S.] was in the same room, and he was doing this stuff to me. I  
14 didn't want my daughter to be around that and think that's how  
15 women are treated . . .

16 (Tr p. 73:19.)

17 Since separation, the child has resided primarily with Ashley. Ashley has  
18 been the primary caretaker of the child since birth. (Tr. pp. 8:10-21.) Daniel  
19 acknowledges that Ashley is a good mother to D.N.S. Daniel testified D.N.S. is  
20 "very attached" to Ashley. (Tr. pp. 8:10-21; 223:5-7.)

21 In late December, 2008, Daniel moved to his hometown of Charlo, leaving  
22 Ashley and D.N.S. in Malta. Daniel states the move was to seek better job  
23 prospects and to be closer to family. (Tr. pp. 8:23 – 10:5.) Daniel also testified he  
24 quit his job in Malta which paid \$10 per hour (Tr. p. 195:22-23) to take part-time  
25 employment in Charlo earning \$7.50 per hour. (Tr. p. 196:21-25.)

26 Daniel has a high school diploma. (Tr. p. 192:8.) Before Daniel moved  
27 from Bozeman to Malta, he was employed for several years as a laborer for a road  
28 construction company, earning approximately \$16 per hour. (Tr. pp. 193:24;  
194:4; 195:6.) At the time of trial, Daniel was unemployed and collected  
unemployment benefits of \$1400 per month. (Tr. p. 15:20.) He testified he was  
diligently looking for work. (Tr. pp. 198:16 – 199:6.) Daniel's mother, on the  
other hand, testified Daniel has been "just hanging out, pretty much." (Tr. p.

1 163:1.) He sits around the house, watches TV and sleeps in; "he likes sleeping in."  
2 (Tr. p. 163:4-5.) From January, 2009, through the time of trial, Daniel contributed  
3 \$50 per month in child support each month, and in one month paid \$100, when he  
4 could have contributed more. (Tr. pp. 224-225.)

5 Ashley articulated good reasons for her proposed parenting plan. Ashley  
6 believes short visits for Daniel are in the child's best interests due to Daniel's  
7 behavioral patterns and drinking. (Tr. p. 91:8-9.) Ashley also testified D.N.S. has  
8 difficulty traveling the 9-hour distance between Malta and Charlo. (Tr. p. 92:3-4.)  
9 "[S]he gets sick, she gets constipated, and she's fussy the whole way." (Tr. pp.  
10 91:24 - 92:2.)

11 Daniel equivocated whether his proposed 50/50 parenting plan was in  
12 D.N.S.'s best interests. Daniel suggested a phased-in schedule may be more  
13 appropriate:

14 BY MR. YELLIN:

15 Q: Do you think that needs to be done right away, or do you think that a  
16 period to get [D.N.S.] accustomed to a lengthier [sic] period of time  
with you would be in her best interests?

17 A: If it's in her best interest and it's appropriate, yeah, I would go a  
length of time, not way too long, but I would go part-time.

18 Q: Because right now you've had her maybe two or three days in Charlo?

19 A: Yeah, two or three days.

20 (Tr. p. 212:20-22.) Daniel also testified he refused to help Ashley with the child  
21 when the parties lived together in Malta (Tr. p. 19:12); he has no philosophy  
22 concerning how children should be disciplined (Tr. p. 26:18-20); he has only a  
23 minimal understanding of the emotional and physical needs of a child (Tr. p. 230-  
24 231); and his interim visitation was exercised mostly with the help of his mother (  
25 (Tr. pp. 157:21 - 159:25).

26 ///

27 ///

1 Finally, at the time of trial Ashley had stable employment with the Malta  
2 hospital, whereas Daniel's was looking for work in road construction and his hours,  
3 locations, and days of employment were unknown. (Tr. pp. 83-84; 240-242.)

## 4 **ARGUMENT**

### 5 **I. THE DISTRICT COURT DID NOT ERR WHEN IT ADOPTED ITS** 6 **PARENTING PLAN.**

#### 7 **A. Standard of Review**

8 The sole issue on appeal is whether the district court erred in its  
9 determination of the child's best interests. This Court has previously held that the  
10 findings and conclusions of a district court regarding the best interests of a child  
11 are presumptively correct and will not be overturned unless there is a clear  
12 preponderance of evidence against them. In re Marriage of Cole (1986), 224 Mont.  
13 207, 729 P.2d 1276, 43 St.Rep. 2136; In re the Custody and Support of B.T.S.  
14 (1986), 219 Mont. 391, 712 P.2d 1298.

15 A district court's findings of fact relating to custody are reviewed to  
16 determine whether those findings are clearly erroneous. In re Marriage of McClain  
17 (1993), 257 Mont. 371, 374, 849 P.2d 194, 196. Findings are clearly erroneous if  
18 they are not supported by substantial evidence, the court misapprehends the effect  
19 of the evidence, or this Court's review of the record convinces it that a mistake has  
20 been made. McClain, 257 Mont. at 374, 849 P.2d at 196. If the findings upon  
21 which a decision is predicated are not clearly erroneous, this Court will reverse the  
22 district court's decision only where an abuse of discretion is clearly demonstrated.  
23 In re Paternity and Custody of A.D.V. (2001) 305 Mont. 62, 22 P.3d 1124.

#### 24 **B. The Trial Court's Findings of Facts and Judgment Are Supported** 25 **by Substantial, Credible Evidence**

26 Daniel claims the court's decision not to adopt his proposed parenting plan  
27 was based only upon two factors; (1) the violence and abuse perpetrated upon  
28 Ashley, and (2) D.N.S. would be fearful of extended absences from Ashley.

1 (Appellant's brief, p. 15:27 – 16:2.) There is absolutely no basis for this assertion  
2 in the court's order, or in the record.

3 It is very apparent from the District Court's judgment that it carefully  
4 reviewed, considered and weighed all of the evidence, much of which was  
5 conflicting. It is equally clear that the court considered all of the parenting factors  
6 set forth in M.C.A. § 40-4-212. (Findings of Fact, Conclusions of Law and Decree,  
7 ("District Court Order") p. 9:2-8.)

8 Further, there is no evidence to support Daniel's assertion that the District  
9 Court "ignored" any facts. (Appellant's brief, p. 16:19-20.) The Order  
10 demonstrates the District Court considered Daniel's arguments concerning 50/50  
11 parenting, but rejected them based upon the evidence. (District Court Order pp.  
12 5:18-28.) The District Court specifically found Daniel's claims that Ashley  
13 endangered the child by drinking during her pregnancy were not credible. (District  
14 Court Order, p. 6:19-22.) The evidence showed Ashley had, at most, consumed  
15 one-half glass of wine during her entire pregnancy. (Tr. p. 92:16.) Daniel did not  
16 contend Ashley had a drinking problem at trial. No credible evidence at trial  
17 supports Daniel's suggestion on this appeal the District Court erred in failing to  
18 order chemical dependency treatment for Ashley.

19 Finding of Fact No. 26 provides, "The child is of an age where stability,  
20 predictability and routine are important. Stability and continuity of care mean as  
21 well that the child should have an opportunity at an early age to get to know and  
22 interact with each parent. However, until 36 months of age, the child can  
23 reasonably be expected to be fearful of extended absences from the primary  
24 caretaker." (District Court Order, p. 6:14-18.) Daniel contends there were no facts  
25 adduced at the hearing to show the child would be fearful of being away from her  
26 mother. (Appellant's brief, p. 17:24-27.)

27 Daniel is correct that there was no direct evidence on the issue of how the  
28 child would likely react to extended periods of time away from Ashley. No such

1 evidence was available at trial because Ashley had only been away from D.N.S. for  
2 brief periods since she was born. This statement is, however, a reasonable  
3 inference drawn from the facts which are in evidence. Daniel testified D.N.S. is  
4 “very attached” to Ashley. Daniel also testified he was not much involved in  
5 caring for D.N.S. while in Malta. Daniel had opportunities to develop a closer  
6 bond with D.N.S., but did not take advantage of those opportunities.

7 Finding No. 26 must viewed in the context of all the District Court’s  
8 findings. When considered in light of the other findings, Finding 26 demonstrates  
9 an honest effort by the District Court to balance the evidence and the relevant  
10 parenting factors set forth in Montana law, as required by M.C.A. § 40-4-212. The  
11 Court's reasoning is consistent with its responsibility to determine the best interests  
12 of the child. The District Court was addressing one of many aspects of how  
13 Daniel’s proposed plan may impact the child. There is no error in the District  
14 Court's finding.

15 There is no indication in the District Court Order to support Daniel’s  
16 assertion that the court in any way presumed the child should be placed with  
17 Ashley because she was the primary caregiver. (Appellant’s brief, pp. 17:27 –  
18 18:1.)

19 Daniel’s assertion that the record lacks evidence to support the travel  
20 schedule, visitation schedule, or location of visitation is incorrect. Among other  
21 things, Daniel could have remained in Malta close to D.N.S. but chose, instead, to  
22 move hundreds of miles away. (Tr. pp. 8:23 – 10:5.) D.N.S. has a difficult time  
23 traveling long distances in a vehicle. (Tr. pp. 91:24 - 92:2.) Ashley’s work  
24 schedule does not reasonable permit her to transport the child to and from Charlo  
25 for visitation. Additionally, Daniel has demonstrated inflexibility which frustrates  
26 Ashley’s ability to travel to Charlo for visitation. (Tr. pp. 80:10 – 83:6.)

27 Finally, Daniel’s assertion the court erred in allocating responsibility for  
28 deciding matters of education and religion to Ashley are baseless. Ashley

described how she takes matters of education very seriously, but Daniel does not. (Tr. pp. 76:16 – 77:14.) Further, as a matter of law, Ashley is responsible for matters of education and religion as the primary residential custodian. M.C.A. § 40-4-218(1) provides:

(1) Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including the child's education, health care, and religious training, unless the court after hearing finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or the child's emotional development significantly impaired.

The court recognized this requirement in finding number 31. Further, Daniel has no cause to complain that the District Court did not adopt the provisions of Ashley's plan which were contrary to Section 218(1). The District Court was bound to use its best judgment to determine the best interests of the child; not the best interests of Ashley or Daniel. M.C.A. § 40-4-212.

**C. Daniel's Argument Concerning the Supposed "Visitation Guidelines" is Wholly Misplaced.**

The District Court did not implement a parenting plan which runs contrary to "its own Child Visitation Guidelines" as Daniel claims. (Appellant's Brief, p. 18:13-14.) Daniel's argument is incorrect for three reasons. First, the document entitled "Child Visitation Guidelines," attached to Appellant's Brief as Appendix E, is not a court-adopted guideline. Instead, the document itself purports to be "guidelines ... adopted by the Seventeenth Judicial District Bar Association as recommendations ... to the District Court..." (Appellant's Brief, Appendix E, fn. 1, p. 1.) Appendix E has absolutely no value as legal authority.

Second, the bar association's recommendations for custody are based upon M.C.A. § 40-4-222 and 224, which was repealed in 1997.

Third, the District Court's findings do not support the assertion that Daniel's proposed 50/50 parenting plan are in the child's best interests, so equal custody is

not called for under the "Visitation Guidelines" (Appendix E) in any event.

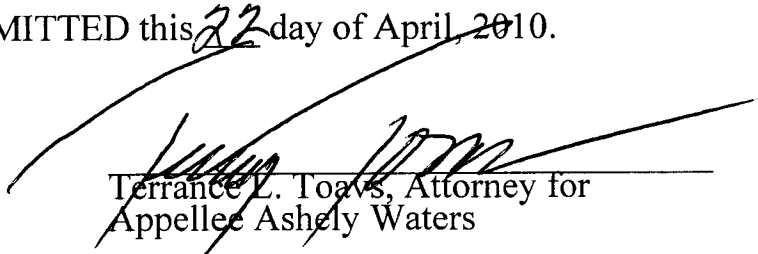
### **CONCLUSION**

In custody cases, it is particularly important for this Court to defer to the district court which personally evaluated the testimony and was in the best position to determine the credibility and character of the witnesses. In re Marriage of Ulland (1991), 251 Mont. 160, 168, 823 P.2d 864, 869. Where the testimony in this case conflicted, it is the District Court's function to resolve those conflicts and determine what parenting plan will best serve the child.

This Court has said time and again that it will not substitute its judgment for that of the District Court. Ulland, 823 P.2d at 870; In re Marriage of Mitchell (1991), 248 Mont. 105, 108, 809 P.2d 582, 584.

No legal cause exists to overturn the decision below. Therefore, the judgment of the District Court should be affirmed.

RESPECTFULLY SUBMITTED this 22 day of April, 2010.

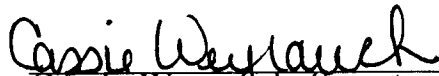
  
Terrance L. Toavs, Attorney for  
Appellee Ashely Waters

### **CERTIFICATE OF SERVICE**

I, Cassie Weyrauch, hereby certify that I served the foregoing Appellee's Brief by depositing a true and correct copy of the same in the United States Mail, postage prepaid, to:

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P.O. Box 564  
Havre, MT 59501

Date: 4/22/10

  
Cassie Weyrauch, Secretary to  
Terrance L. Toavs

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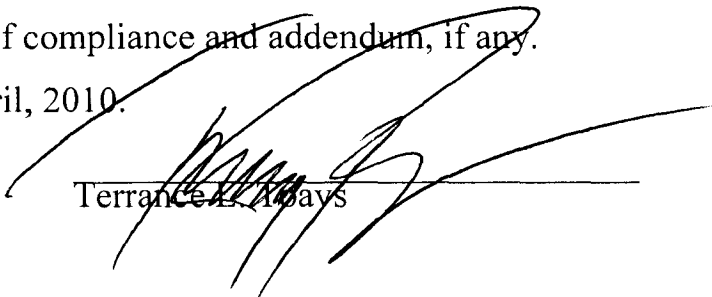
8 CLAUDE DANIEL SMITH,

9 Respondent and Appellant.

CERTIFICATE OF  
COMPLIANCE

10 Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify  
11 that this principal brief is printed with a Times New Roman, proportionately spaced  
12 typeface of 14 points, is double spaced except for footnotes and quoted and  
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14 attorney's word processing software, excluding table of contents, table of citations,  
15 certificate of service, certificate of compliance and addendum, if any.

16 Dated this 22 day of April, 2010.

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18 Terrance L. Davis  
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